

EXAMPLE 1

Brothers, Bob and Jim, own a farm as tenants in common. Each owns a 50 percent undivided interest. Jim dies, leaving his share equally to his 5 children. Bob still owns a 50 percent undivided interest, but his nieces and nephews are his new co-owners. Each owns a 10 percent undivided interest in the property. Bob dies, leaving his undivided interest to his 10 children. Each of his children owns a 5 percent undivided interest. There are now 15 owners to the farm. To sell the entire farm, the 15 cousins must agree to the sale. Any cousin may choose to sell his or her individual interest. What happens if the 15 cousins pass the property on to their children? If each has 5 children, the number of co-owners increases to 75. It may become difficult to sell the entire farm with clear title.

fractional interest. For example, if Jane owns a 25 percent undivided interest in property with a fair market value of \$100,000, the value of her interest for estate tax purposes may be \$25,000. However, Jane's estate may make a strong argument that the value of her interest is less than \$25,000. A fractional interest in property is less marketable and less desirable than an entire interest.

Tenancy by the entirety. Generally, a husband and wife own real property as tenants by the entirety. If the document of title conveys the land to a husband and wife, North Carolina law presumes that a tenancy by the entirety is created, unless a contrary intention is shown. In most circumstances, the deed does not need to state that a tenancy by the entirety is created. However, if you plan to give your spouse an interest in property that you own as tenants in common with someone else, check with your attorney. If you and your co-owner are partitioning the property and you plan to give your spouse an interest in your share of the property, you need specific language in the deed to create a tenancy by the entirety.

Only a husband and wife may own real property as tenants by the entirety. Under the law, each spouse owns the entire interest in the property. However, neither spouse may sell, lease, or mortgage the property without the written consent of the other. This rule is based on the legal fiction that a husband and a wife are the same person. Divorce automatically ends a tenancy by the entirety, converting it to tenancy in common in which each ex-spouse owns a one-half, undivided interest. Property acquired by a couple prior to marriage will generally be held as a tenancy in common. A subsequent marriage does not convert the ownership to a tenancy by the entireties.

In North Carolina, a husband and wife have equal rights to the control, use, possession, rents, and profits of real property that they own as tenants by the entirety. If they file separate income tax returns, each spouse must report one half of the income or loss from the property. Creditors cannot take property held as tenants by the entirety for payment of a debt that is owed by only one spouse.

Upon the death of one spouse, the surviving spouse automatically owns the property. The property is not transferred by the will of the deceased spouse and is not probated in the

deceased spouse's estate. If both spouses die at the same time, the property is split equally and half of the property probated in the estate of each spouse.

One-half the fair market value of the property is included in the deceased spouse's gross estate for estate tax purposes. No tax liability results because property passing to the surviving spouse is exempt from federal and state estate taxes. If the property was acquired before 1977, however, the amount included in the deceased spouse's gross estate may be the amount the spouse contributed toward acquiring the property. Ask your attorney or tax advisor for details.

Tenancy by the entirety is a popular way for husbands and wives to co-own real property. It simplifies the transfer of ownership at death. However, some husbands and wives may find there are estate tax reasons for owning the property differently. A companion publication discusses this: *Federal and North Carolina Gift and Estate Taxes* (AG-688-03). To find out which form of ownership is right for your family, consult an accountant or attorney.

Joint tenancy with right of survivorship: Two or more persons may own equal shares in property as joint tenants with right of survivorship. Bank accounts, certificates of deposit, and stock certificates are the most common types of personal property owned in this manner. Real property may also be owned jointly with a right of survivorship.

This form of ownership arises only by express agreement. The document creating the joint tenancy must expressly provide for the right of survivorship. For example, if you and your spouse open a joint bank account, you must choose whether you will own the account with or without a *right of survivorship*. Under the law of North Carolina, if you agree to a joint tenancy in either real or personal property but neglect to indicate whether it is owned with or without a right of survivorship, it is presumed to be *without* right of survivorship.

Upon the death of a joint tenant, in a joint tenancy with right of survivorship, the property automatically passes to the surviving joint tenant or tenants. The deceased joint tenant's will does not control who gets the property. Example 2 illustrates such a situation. Note: Property held without right of survivorship passes at death in the same manner as property held as tenants in common.

EXAMPLE 2

Mary is a widow with three children. Mary is afraid she may become ill and forget to pay her bills. She wants to give her youngest child, Jane, legal authority to write checks and make deposits on her account. She and Jane open a joint account, the signature card for which states that it is "with a right of survivorship." Mary sells her house and her farm and deposits the sale proceeds in her bank account. In her will, Jane leaves her property equally to her three children. When Mary dies, Jane becomes sole owner of the funds. Jane likely has no legal obligation to share the money with her brother and sister. This is the type of situation, however, that often leads to litigation because it raises such issues as overreaching by Jane and Mary's competence to enter the joint tenancy agreement. Mary's will does not control who owns the money in the account.